

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SUSAN M. FOLK

Claimant

VS.

HALDEX BRAKE SYSTEMS

Respondent

AND

**KEMPER INSURANCE CO. and
ROYAL & SUNALLIANCE INS. CO.**

Insurance Carriers

Docket Nos. 258,343 &
1,011,042

ORDER

Respondent and its insurance carrier, Kemper Insurance Company request review of the May 11, 2006 Order by Administrative Law Judge Brad E. Avery. This is a post-award proceeding for medical benefits which consolidated claimant's request for post-award medical and respondent's preliminary hearing/motion to terminate medical as well as respondent's application for review and modification in Docket No. 258,343 with claimant's request for preliminary hearing benefits in Docket No. 1,011,042.

APPEARANCES

Claimant appeared by her attorney, Chris Miller of Lawrence, Kansas. Respondent and its insurance carrier Kemper Insurance Company (Kemper) appeared by their attorney, Michelle Daum Haskins of Kansas City, Missouri. Respondent and its insurance carrier Royal and Sun Alliance Insurance Company (Royal) appeared by their attorney, Timothy J. Piatchek of Lenexa, Kansas.

RECORD

The Board has considered the following record for the purposes of this appeal: the transcript of the Post Award/Review and Modification/Preliminary Hearing of March 7, 2006; the transcript of the Preliminary Hearing of December 9, 2003, with attached exhibits; the deposition of the Susan Marie Folk, dated October 14, 2005, with attached exhibits; the deposition of Edward J. Prostic, M.D., taken October 19, 2005, with attached

exhibits; the deposition of Peter V. Bieri, M.D., taken September 15, 2005, with attached exhibits; the transcript of Motion Hearing held July 25, 2005; as well as the pleadings and documents contained in the file of the Division of Workers Compensation in these two docketed claims.

ISSUES

The Administrative Law Judge (ALJ) found the claimant's current need for medical treatment is related to her original accidental injury on June 11, 1999, which places the liability on Kemper.

Kemper requests review of whether the claimant sustained a new accident to her cervical spine in 2003 at which time Royal was the respondent's workers compensation insurance carrier. Kemper argues that claimant's original injury was to her thoracic spine and her current symptoms in her cervical spine are neither directly related to nor a natural and probable consequence of her original injury.

Claimant argues neither the ALJ nor the Board had jurisdiction to address the respondent's request to terminate claimant's medical treatment because K.S.A. 44-510k does not provide respondent such a procedure. In the alternative, claimant argues it is undisputed that she suffers continuing symptoms and complaints related to her ongoing work for respondent and should be entitled to continued medical treatment from respondent and the appropriate insurance carrier.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

A review of the history of this claim is necessary. In Docket No. 258,343 claimant alleged a specific injury on June 11, 1999, and each and every day worked since, to her upper back, left shoulder and all affected areas. In Docket No. 1,011,042 claimant alleged injury March 9, 2001, and each and every day worked since, to her upper back, left shoulder and all affected areas. At the time of the preliminary hearing the claimant was still working for respondent.

On March 8, 2001, the claimant settled her claim in Docket No. 258,343 based upon Dr. Peter V. Bieri's 5 percent whole person functional impairment rating pursuant to DRE

Cervicothoracic Category II of the AMA *Guides*.¹ The settlement left open the claimant's right to review and modification as well as future medical upon proper application.

On June 11, 2003, the claimant filed an application for post award medical as well as an application for review and modification in Docket No. 258,343. The claimant was requesting continuation of medical treatment with Dr. Brian D. Wolfe and further argued that her impairment had increased. On December 11, 2003, the ALJ determined in both dockets that the claimant's current need for medical treatment was due to her original injury and therefore issued an Order for Medical Treatment with Dr. Wolfe to be paid by respondent and its insurance carrier, Kemper.

Claimant filed another application for post award medical on May 12, 2005, in Docket No. 258,343. Then on May 13, 2005, the respondent filed an application for preliminary hearing/motion to terminate medical care and treatment in Docket No. 258,343. On October 20, 2005, the ALJ issued an Order denying respondent's motion to terminate medical care in Docket No. 258,343. The ALJ ruled that he did not have jurisdiction because the request to terminate medical benefits was in effect an appeal by respondent from the ALJ's earlier award of post-award medical on December 11, 2003. Respondent then filed an application for review before the Workers Compensation Board. The Board determined the ALJ had jurisdiction to determine whether claimant's ongoing complaints and need for medical treatment were a natural and probable consequence of the injuries in Docket No. 258,343, or the result of a new series of accidents as alleged in Docket No. 1,011,042. Accordingly, in its Order on January 18, 2006, the Board reversed and remanded the matter to the ALJ for further proceedings.

The claimant filed an appeal of the Board's Order with the Court of Appeals on February 16, 2006. On March 28, 2006, the Court of Appeals determined the Board's Order remanding the matter to the ALJ was interlocutory and dismissed the appeal.

On February 17, 2006, respondent filed an application for review and modification in Docket No. 258,343, and, as previously noted, on March 7, 2006 a proceeding designated Post Award/Review and Modification/Preliminary Hearing was held. The parties did not submit additional evidence but agreed to incorporate the previous proceedings as the record. The ALJ noted the claimant had appealed to the Court of Appeals and as a result the ALJ set terminal dates for the Post Award/Review and Modification and continued the preliminary hearing aspect of the proceeding noting that he

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

hoped the Court of Appeals would make a determination within the established terminal dates so he could make his decision thereafter. The ALJ then concluded:

JUDGE AVERY: All right. So with that, I will await the Court of Appeals' decision, and if we go forward with this, then I will request that the party submitting additional evidence on Preliminary Hearing statute - - or at Preliminary Hearing, and at that time if there is none and if the terminal dates expire then I will make a decision based upon what we have on 5/8/06. All right. Thank you very much.²

On May 11, 2006, the ALJ issued the current order finding the claimant's need for medical treatment was related to her original injury on June 11, 1999. The ALJ stated:

In this case, the claimant's symptoms have grown worse and migrated as the result of the same repetitive activities which caused her original injury. There was no independent trauma that caused a 'new injury' but rather it appears there was a continuation and worsening of the original injury.³

Kemper then filed an application for review which is the subject of this appeal.

After the settlement of her claim in Docket No. 258,343, the claimant received continuing medical treatment consisting primarily of medication and physical therapy. Claimant testified that since March 2001 her neck has gotten worse as she continued to perform repetitive motion activities at work. But claimant noted that she had popping in her neck back in 1999 after the original injury while lifting boxes but the more significant pain at that time had been in her back.

The claimant continued working for respondent and noted that before she settled her claim in Docket No. 258,343 her job duties had changed because she was no longer required to lift boxes overhead. Her present job duty requires that she work with her arms flexed in front of her at about chest level. Claimant further testified she had not experienced any specific accident or injury since March 2001.

In the summer of 2003 her pain increased to the point that Dr. Wolfe took her off work for a little over two months due to severe back pain. After claimant complained to Dr. Wolfe about her neck complaints he then referred claimant to Dr. William A. Bailey. According to Dr. Bailey, in December 2004, claimant reported to him that although she had

² P.A./R.&M./Prelim. Hearing Trans. at 6-7.

³ ALJ Order (May 11, 2006) at 1.

ongoing symptoms in her mid-back she had recently developed pain in the right side of her neck radiating into her shoulder.

Dr. Bieri had examined claimant in January 2001 in connection with her original claim in Docket No. 258,343. At Kemper's attorney's request, claimant was again evaluated and examined by Dr. Bieri on August 19, 2005. In his report of that examination the doctor noted in pertinent part:

The claimant presents now specifically for evaluation of pain involving the cervical spine region, and the requesting source has made a specific point of asking whether or not this is related to the original injury of 1999, or can be considered a new injury.

Review of the extensive documentation fails to reflect any mention of neck pain attributable to the original injury in 1999.

Documentation does reflect some type of "new injury" in 2003, but this was limited to the thoracic spine.

The first mention of any neck symptomatology occurred in late 2003, and subsequent in 2004. The most recent diagnosis to the neck was cervical spondylosis, with cervical strain and possible radiculopathy. This was the basis for treatment that included epidural block injections.

Based on review of documentation as provided and the results of clinical examination, I would conclude that the claimant sustained no significant injury to the neck in 1999, and that her current symptomatology involving the cervical spine region is most likely attributable to the cervical spondylosis. The only mention of any possible subsequent new work-related injury would relate to the so-called "pulling" incident in 2003, but this was evidently limited to the thoracic spine region.

At present, any need for medical treatment to the cervical spine region is not considered an ongoing need based upon the injury known to exist from 1999.⁴

Dr. Bieri further testified that he was unaware of any condition in the thoracic spine that would migrate up or down the spine and it would be unusual for complaints to move up the spine from the thoracic level to the cervical.

Dr. Prostin examined claimant on October 4, 2000, and on October 7, 2005, at the request of claimant's attorney. The doctor agreed that when he saw claimant in October

⁴ Bieri Depo., Ex. 3.

2000 all her treatment had been directed to her thoracic spine. The doctor further opined that the popping in claimant's neck at that time was unrelated to trauma. The doctor concluded claimant was at maximum medical improvement and he rated claimant's injury to the thoracic spine.

When Dr. Prostic examined claimant in 2005 she provided him a history of progressive worsening of pain to the left shoulder, neck and upper back. In his report of that examination, the doctor noted in pertinent part:

During the course of her employment through the present at Midland Brake Company, Susan M. Folk has sustained repetitious minor trauma. She continues with significant complaints about her neck, upper back, and left shoulder. The source of her symptoms is not certain at this time. It is recommended that she have a bone scan. If it shows increased activity in the thoracic spine, then spondylosis of the thoracic spine would be the appropriate source of her symptoms. If the bone scan is unremarkable or active elsewhere, another diagnosis will have to be pursued.⁵

The doctor noted the anatomical location of claimant's symptoms changed from her mid back or thoracic to the upper or cervical. The doctor concluded that claimant's current symptoms were work-related because she complained of an acceleration of symptoms during the course of her work. But the doctor noted that the repetitive trauma claimant continued to suffer was to her shoulders.⁶

The medical evidence fails to support a finding that claimant's current cervical complaints are the natural and probable consequence of her injury in Docket No. 258,343. Dr. Bieri specifically determined the claimant's cervical complaints were not related to the original claim and Dr. Prostic noted the popping in claimant's neck was not caused by trauma. Moreover, Dr. Bieri was unable to state the claimant's current work activities aggravated her cervical condition. Although Dr. Prostic indicated claimant's repetitious work activities were causing her current pain complaints he equivocated and said such activities were causing trauma to her shoulders. Based upon the medical evidence provided at the consolidated proceedings, the claimant has failed to establish that her cervical complaints are the natural and probable consequence of her original claim in Docket No. 258,343 and respondent's request to terminate medical treatment for claimant's cervical complaints under Docket No. 258,343 is granted.

⁵ Prostic Depo., Ex. 3.

⁶ *Id.* at 25.

Conversely, Dr. Prostic's testimony establishes claimant's ongoing complaints are the result of her continued work activities. Claimant has established that she has suffered a series of work-related injuries as she has continued working as alleged in Docket No. 1,011,042. Consequently, Docket No. 1,011,042 is remanded to the ALJ for further proceedings consistent with the findings herein.

AWARD

WHEREFORE, it is the decision of the Board that the Order of Administrative Law Judge Brad E. Avery dated May 11, 2006, is reversed in Docket No. 258,343 and remanded in Docket No. 1,011,042.

IT IS SO ORDERED.

Dated this _____ day of November 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and Kemper
Timothy J. Piatchek, Attorney for Respondent and Royal
Brad E. Avery, Administrative Law Judge